82-2162



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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No. _____

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SAFECARD SERVICES, INC.

Petitioner,

v.

DOW JONES AND COMPANY, INC.
ALAN ABELSON and STEVEN ANREDER,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO
THE FOURTH CIRCUIT COURT OF APPEALS

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## QUESTIONS PRESENTED

1. Whether the protective shield of the unique fact-finding process established in this Court's First Amendment opinions in libel cases against the media, beginning with New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 684 (1964), extends to suits against the press on other causes of action such as S.E.C. Regulation 10b-5 actions for market manipulation.

A. Whether in a market manipulation case brought under S.E.C. Regulation 10b-5 against the press the issue of whether an untrue statement is one of fact or opinion is an issue of law or an issue of fact.

B. Whether in a market manipulation case brought under S.E.C. Regulation 10b-5 against the media the issue of the materiality of an admitted untruth is an issue of law or an issue of fact.

II

## LIST OF PARTIES TO THE PROCEEDING

SafeCard Services, Inc.

Dow Jones & Company, Inc.

Credit Card Services Corporation

Alan Abelson

Steven Anreder

John P. Ferry

Walter Hurney

Kelly, Black, Black, Earle & Patchen, P.A., Attorneys for SafeCard Services, Inc.

Lewis, Wilson, Lewis and Jones, Ltd., Attorneys for SafeCard Services, Inc.

Thomas & Sewell, P.C., Attorneys for Credit Card Service Corporation, John P. Ferry and Walter Hurney

Patterson, Belknap, Webb & Tyler, Attorneys for Dow Jones & Company, Inc., Alan Abelson and Steven Anreder

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## V

## JURISDICTION

The date of the Judgment of the Fourth Circuit Court of Appeals from which this appeal is taken is March 31, 1983. No petition for rehearing was made. This Petition for Certiorari was filed within ninety (90) days of the date of the Judgment of the Fourth Circuit Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## VI

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. §78j

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange -

(b) To use or employ, in connection with the purchase or sale of any security

registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Commission Rule 10b-5

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange -

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the

circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

## VII

## STATEMENT OF THE CASE

This action was instituted by SafeCard Services, Inc. (hereinafter "SafeCard") against the defendants for violation of S.E.C. Rule 10b-5, Sections 1 and 2 of the Sherman Act, and applicable State law.

This Petition for Certiorari seeks to upset the affirmance by the Fourth Circuit of a final summary judgment granted in favor of the defendants, Dow Jones and Company, Inc., Alan Abelson and Steven Anreder (hereinafter "Dow Jones defendants") and against SafeCard by the Honorable Richard L. Williams of the Eastern District of Virginia. Judge Williams also granted a partial summary judgment in favor of defendants Credit Card Service Corporation, John P. Ferry and Walter Hurney (hereinafter "CCSC

defendants") and against the plaintiff SafeCard. The memorandum Opinion of Judge Williams is published at 537 F.Supp. 1137. Judge Williams rendered the judgment appealed from on Thursday, April 29, 1982, the eve of the trial scheduled for May 3, 1982. The parties thereupon stipulated to a dismissal without prejudice of what was left of the case under Federal Rule of Civil Procedure 41(a)(ii); the court entered an Order dismissing the remainder of the case without prejudice on April 29, 1982. The appeal followed on May 19, 1982. The Fourth Circuit on March 31, 1983 affirmed, adopting Judge Williams' opinion as its own.

SafeCard is a small public company principally in the credit card registration business whose stock sells over-the-counter. For years SafeCard's stock and business had taken a financial battering

from a deadly combination of the editors of Barrons, a weekly financial magazine published by the defendant Dow Jones and Company, Inc. (hereinafter "Dow Jones"), and those who control SafeCard's only real competitor Credit Card Services Corporation (hereinafter "CCSC"). The defendant Alan Abelson (hereinafter "Abelson"), now the Managing Editor of Barrons, and John P. Ferry (hereinafter "Ferry"), Chairman of the Board and chief executive officer of CCSC, admittedly shared an all-consuming hatred of Peter Halmos (hereinafter "Halmos"), SafeCard's Chairman of the Board, inspiring each man with a messianic, self-righteous zeal to bring Halmos and his SafeCard down. Thus, to Abelson, within earshot of a court reporter in this case, Halmos is, among other species of rascality, a "phony" and a "nut" and a "despicable person" who "obviously wants to throttle the press . .

. hates criticism . . . [and] . . . doesn't understand the institutions of this country at all." Said Abelson, "I think . . . the tenor and temper of [Peter Halmos'] communications to us would certainly suggest that clinical help would not be out of line in this case."

Equal to Abelson in his hatred of Halmos is Ferry, Chairman of the Board and chief executive officer of CCSC, SafeCard's principal competitor. In the words of a former CCSC Director and Marketing Manager, "Ferry has always been overly concerned about SafeCard." Ferry was "terribly concerned, over-concerned, unduly concerned, but I don't think I can use the term paranoia. Semi-obsessed, I will go that far with you." Like Abelson of Barrons, Ferry feels that Halmos "is a very sick individual and

needs professional help" with "a deranged mind" who "rips off the public".

So in the spring of 1978 the people at Barrons, proclaiming that SafeCard's stock was "hyper-inflated" and the people of CCSC, proclaiming that SafeCard's business practices "ripped off the public" joined forces in what each claimed to consider a holy crusade in "the public interest": the restraint of the growth of SafeCard's stock and SafeCard's business. The people at CCSC fed unfavorable material to the people at Barrons with sure knowledge that it would be recycled into the seemingly disinterested Barrons for exhibition to potential clients in head-to-head competition with SafeCard. The recycled material, in draft form, was submitted to the people at CCSC by Barrons prior to publication. The people at Barrons published the material with the

intent and knowledge that with the help of Barrons-related, market-maker short-selling, SafeCard's business and stock would be severely harmed.

Sorely restrained, both in the stock market and in the marketplace by this deadly combination, SafeCard brought suit against Dow Jones and CCSC, alleging, among other things, market manipulation by Barrons in violation of S.E.C. Rule 10b-5. SafeCard, hoping to avoid the special privilege fact-finding process accorded to the press in libel suits, did not include a libel count in its Complaint. During the proceedings, Dow Jones admitted that Barrons despised SafeCard's Chairman of the Board, Peter A. Halmos; that Barrons had the power to influence the market in SafeCard's stock downward; that Barrons intended the articles in question to influence the market for

SafeCard's stock downward; that the articles in question did, in fact, influence the price of SafeCard's stock downward; and that two of the articles contained untruths. However, claimed Dow Jones, one untruth was not material and the other was protected opinion, albeit stated as a fact.

Throughout the proceedings, Dow Jones chided SafeCard for its failure to include a libel count in its Complaint and contended that, even though SafeCard did not include a libel count, Dow Jones was, nevertheless, entitled to the special privilege fact-finding process accorded to the press in libel cases. The trial court, using the special fact-finding process to formulate its summary judgment, also noted that SafeCard had not included a libel count in its Complaints.

Without treating the subsidiary issues surrounding the two admitted untruths as matters of law rather than matters of fact, the trial court could not have granted summary judgment. The court in considering whether the statement "I maintain that [SafeCard], in fact, is engaged in accounting no-nos" was fact or opinion said: "Whether 'in fact' implies it is a matter of fact that . . ., or was used merely for emphasis, is a question over which reasonable minds might differ." 537 F.Supp. at 1143.

The first untruth appeared in the June 19, 1978 Barrons article which severely impacted the price of SafeCard's stock on the downside. The theme of the article was that, although today things looked bright for SafeCard, dark days loomed ahead, growing out of SafeCard's use of a negative option technique in

selling its services. Negative option, proclaimed the article, was already "no-go" for products, and the FTC was looking into the relationship between negative option and sales of services, the clear implication being that negative option would soon also be "no-go" for services. In fact, negative option was not "no-go" for products, and the author of the Barrons article had the notes of his research assistant reflecting that negative option for products was perfectly legal when the article was written. Using the special privilege fact-finding process available to the press in libel cases, the trial court treated the question of materiality of the admitted untruth as one of law and not of fact, and concluded by summary judgment that the untruth was immaterial.

The second admitted untruth came in the Barrons article of July 6, 1982, which single-handedly killed a firm commitment underwriting of SafeCard's stock then in progress. Underwritings cannot proceed until the S.E.C. approves the registration statement of the issuer. The S.E.C. does not approve registration statements that include financial statements not prepared in accordance with generally accepted accounting principles. The July 6, 1982 article was supposedly prepared by Abraham Briloff, an accountant; his theme is wrapped in this terse sentence: "I maintain that the company, in fact, is engaged in accounting no-nos." (Emphasis ours). Dow Jones contended that ". . . Dr. Briloff, acknowledging that SafeCard's accounting comported with generally accepted accounting principles and had been blessed by its independent auditors, repeatedly stated that he was 'simply

putting forth his views of the accounting practice in issue'". Contrast this with Briloff's own characterization of the article: "By this glib reference . . . SafeCard pretends it has blunted my <u>flat assertion</u> that it's accounting principles <u>do violence</u> to a fair application of generally accepted accounting principles. . .." (Emphasis ours).

Once again, using the special privilege fact-finding process available to the press in libel cases, the trial court treated the question of whether the admitted untruth was one of fact or opinion as one of law and concluded by summary judgment that what Briloff characterized as "his flat assertion" was mere protected "opinion".

It is the propriety of this special privilege fact-finding process that

SafeCard requests this Court to address by its Petition for Certiorari.

## VIII

## REASONS FOR GRANTING THE WRIT

No statement has been repeated nor confirmed by experience more than Lord Acton's "power corrupts; and absolute power corrupts absolutely". No phrase has more currency in our language than "the arrogance of power". Unfortunately, the singular power entrusted to the press through the First Amendment by this Court in the libel cases of the nineteen-sixties and early nineteen-seventies beginning with New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 684 (1964), has proven no exception to the wisdom implicit in these sayings as the instant case illustrates. Pre Sullivan, what member of the press would dare to boast "I got in the final licks" in an article that wiped out a stock underwriting. Pre Sullivan, what member of the

press would react to criticism by the victim of an unfavorable article by exploding under oath that the victim is a "phony" and a "nut" and a "despicable person" who "obviously wants to throttle the press . . . hates criticism . . . [and] . . . doesn't understand the institutions of this country at all." The ordinary people who sit on juries have noticed the arrogance of certain members of the press that has accompanied the unique privileges accorded to the press by this Court after Sullivan. As the defendant Dow Jones reported in the June 24, 1983 edition of its Wall Street Journal:

> Appellate review is especially important to the press - given it's sorry record of late in the trial courts. Recent studies show media defendants in libel suits lose over 80% of cases at trial but go on to win nearly 70% at the appeals court level . . . .. (Underlining ours).

The press, however, has not since Sullivan had to worry very much about the fact-finding processes of a trial. Few press litigation specialists today even know what a trial is, so frequent are the summary judgments, and those who are compelled to suffer a trial take comfort in the knowledge that any adverse finding by the jury or trial judge that their claimed honest mistakes or opinions are, in reality, lies, will be reversed on appeal, no matter that those findings are not "clearly erroneous". In libel cases, the courts have simply come to treat the question of whether an untruth is an honest mistake or an opinion as one of law and not of fact, even though tacitly recognizing that the opposite is, in reality, the case.

This Court, by granting certiorari on April 25, 1983, in Bose v. Consumers Reports, No. 1646, appears to have

determined to reexamine with a view to contraction the special fact-finding process established for the press in defamation cases. The instant case is important to that reexamination because this case to date represents a successful effort by the financial press to stretch the special privilege fact-finding process of libel actions to other actions against the press such as actions for market manipulation under S.E.C. Rule 10b-5. If the ordinary citizen is accused of artificially influencing the market price of stock by lies, he must submit to a full-fledged trial and accept, if it comes, the verdict of the trier of fact that what he claims was an honest mistake or opinion was, in fact, a lie. Under the law of the instant case however, a member of the press similarly accused need suffer no such thing; he probably will not have to go to trial or, if he goes and loses, he will enjoy de novo consideration on appeal.

In other words, in a market manipulation case, the question of whether an untruth is a lie or an opinion is a question of fact for the ordinary citizen but a question of law for the press. If the scales of justice which are the symbol of this Court are to be kept in balance, this Court must adjust those scales by a definitive opinion making clear that the special fact-finding process available to the press in defamation cases apply, if at all anymore, only in defamation cases.

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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO

THE FOURTH CIRCUIT COURT OF APPEALS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF VIRGINIA

Alexandria Division

| | | |
|---|---|---|
| SAFECARD SERVICES, INC., Plaintiff, | ) | |
| v. | ) | Civil Action No. 81-0631-A |
| DOW JONES & COMPANY, INC., et al., Defendants. | ) | |

ORDER

This matter came before the court on motions for summary judgment brought by defendants under Fed.R.Civ.P. 56(b). For reasons stated in the accompanying memorandum, the court GRANTS summary judgment to defendants Dow Jones and Company, Inc., Alan Abelson and Stephen Anreder on Counts I and II, and also DISMISSES without prejudice the remaining counts as to them. Also, for reasons stated in the memorandum, the court

GRANTS summary judgment to defendants Credit Card Sevices Corporation, John P. Ferry and Walter Hurney on Count I, and DENIES them summary judgment on the remaining counts.

Let the Clerk send a copy of this order and the accompanying Memorandum to counsel of record.

Richard L. Williams
UNITED STATES DISTRICT JUDGE

DATE: April 29, 1982

SAFECARD SERVICES, INC., Plaintiff,

v.

DOW JONES & COMPANY, INC., et al,
Defendants,

Civ. A. No. 81-0631-A

United States District Court,
E.D. Virginia,
Alexandria Division.

April 29, 1982

Credit card loss notification service brought action against another such service, its board chairman and vice-president and the publisher of a financial journal and journal columnists alleging violation of securities regulation and antitrust law. The defendants moved for summary judgment. The District Court, Richard L. Williams, J., held that: (1) plaintiff could not bring claim against publisher and columnists under securities regulation prohibiting publication of false or misleading statement in connection with

sale of securities where statements were expressions of opinion appearing in press and where service voluntarily sold stock under stock option plan after knowledge of alleged fraud; (2) monopoly claims against publisher and columnists could not be maintained where evidence was too attenuated for rational jury to infer specific intent; (3) claim against other service under securities regulation could not be maintained since that service did not make alleged false and misleading statements; and (4) issues of material fact remained on monopoly claim against other service, precluding summary judgment.

Partial summary judgment granted.

1. Securities Regulation (Key No. 119)

Credit card loss notification service could not bring action against publisher of financial journal and journal columnists for violating securities regulation against

issuing untrue statement of material facts in connection with sale of securities where service did not rely on disparaging journal articles when it voluntarily sold stock to employees under stock option plan which was established after service had knowledge of alleged misrepresentations. Securities Exchange Act of 1934, §10(b), 15 U.S.C.A. §78j(b).

2. Securities Regulation (Key No. 63)

Under securities regulation prohibiting publication of untrue statements of material fact in connection with sale of securities, fact is not "material" if there is not substantial likelihood that reasonable investor would consider fact important in making investment decision. Securities Exchange Act of 1934, ¶10(b), 15 U.S.C.A. §78j(b).

See publication Words and Phrases for other judicial constructions and definitions.

3. Securities Regulation (Key No. 60)

Credit card loss notification service could not bring action against publisher of financial journal and journal columnists under securities regulation prohibiting publication of untrue statements of material facts in connection with sale of securities where statements alleged to be untrue were expressions of opinion appearing in press, opinions were not clearly unreasonable, there was no evidence that columnists did not believe opinion expressed or that columnists or publisher had any economic interest in service or its competitors, and columnists were not insiders to service. Securities Exchange Act of 1934, ¶10(b), 15 U.S.C.A. ¶78j(b).

4. Monopolies (Key No. 28[7.1])

Specific intent to monopolize may be inferred from extreme predatory or

exclusionary conduct. Sherman Anti-Trust Act, ¶2, 15 U.S.C.A. ¶2.

5. Monopolies (Key No. 12[3])

Claim of credit card loss notification service that publisher of financial journal and journal columnists conspired with service competitor to monopolize such service could not be maintained where evidence of columnist's personal animosity toward service board chairman, publisher's contacting competitor and federal agencies concerning service, similarity of critical statements made by competitor and publisher, and use by competitor of articles published in financial journal in competing for accounts was too attenuated for rational jury to infer specific intent and where there was no evidence of economic benefit inuring to publisher and columnists as result of their alleged acts. Sherman Anti-Trust Act, ¶2, 15 U.S.C.A. ¶2.

6. Monopolies (Key No. 12[3])

Publication by financial journal publisher of articles containing disparaging comments about credit card loss notification service did not constitute a violation of Sherman Anti-Trust Act prohibition against restraint of trade even assuming combination of publisher and service competitor where articles contained truth and reasoned opinion. Sherman Anti-Trust Act, ¶1, 15 U.S.C.A. ¶1.

7. Federal Courts (Key No. 17)

Federal district court would decline to exercise pendent jurisdiction over state claims for conspiracy to injure another in trade or business brought by credit card loss notification service against publisher of financial journal and journal columnists where application of state conspiracy law to press defendants could raise substantial constitutional questions from which court

should abstain and where district court had doubts regarding propriety of applying Virginia law as between parties whose principal places of business were in Florida and New York. Va.Code 1950, §§18.2-499, 18.2-500, 18.2-500(a).

8. Securities Regulation (Key No. 60)

Credit card loss notification service could not bring action against another such service, its board chairman and vice-president for violating securities regulation prohibiting publication of untrue and misleading statements in connection with sale of securities where statements were not made by the other service but by publisher of financial journal and its columnists. Securities Exchange Act of 1934, §10(b), 15 U.S.C.A. §78j(b).

9. Federal Civil Procedure (Key No. 2484)

In action by credit card loss notification service against another such service, its board chairman and vice-president for conspiracy to monopolize and pendent state claims for conspiracy to injure another in trade or business, issues of material fact remained on question whether board chairman and vice-president conspired with other service, precluding summary judgment. Va.Code 1950, §§18.2-499, 18.2-500, 18.2-500(a); Sherman Anti-Trust Act, §§1, 2; 15 U.S.C.A. §§1, 2; Fed.Rules Civ.Proc. Rule 56(b), 28 U.S.C.A.

---

Oren R. Lewis, Jr., Arlington, Va., Hugo L. Black, Jr., Miami, Fla., for plaintiff SafeCard.

David Fiske, John E. Coffey, Alexandria, Va., for defendants Ferris, Hurney, Kushnick, Ferry and Credit Card Service Corp.

Thomas Moncure, Alexandria, Va., for defendants Dow Jones & Co., Inc., Abelson and Anreder.

Philip Hare, Falls Church, Va., for defendant Purcell Graham & Co.

Andrew P. Miller, Washington, D.C., for defendant Cox.

## MEMORANDUM

RICHARD L. WILLIAMS, District Judge.

This matter came before the court on defendants' motions for summary judgment under Fed.R.Civ.P. 56(b). For the reasons stated below, the court grants partial summary judgment to defendants.

Plaintiff SafeCard is a public company engaged in the mass mail order marketing of a loss notification service for credit cards. A cardholder has a maximum liability of $50 per card when an unauthorized use of a card as a result of loss or theft occurs. If the cardholder notifies the issuer of the card's theft or loss before an unauthorized use of the card

occurs, the cardholder has no liability. See 15 U.S.C. §1643. Of course, the cardholder may notify each card issuer directly when he loses credit cards. The chief benefit of the service is its convenience: a subscriber whose cards are missing need call only the notification service instead of calling each card issuer.

SafeCard markets its service through credit card issuers. Because the service is marketed through but is not supplied by the issuers, SafeCard refers to its marketing as "third-party-endorsed."

SafeCard claims that the defendants conspired to disseminate false or misleading statements in connection with SafeCard's sales of its securities, in violation of §10(b) of the Securites Exchange Act of 1934, 15 U.S.C. §78j, and Rule 10b-5

thereunder (Count I);[1] and that the defendants conspired to eliminate SafeCard

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1. In pertinent part, Section 10(b) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, promulgated thereunder, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or

from competition in the credit card loss notification market, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (Count II).[2] [3] Pendent state

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would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

2. Section 1 provides, in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of court. 15 U.S.C. §2.

3. The court has jurisdiction under 15 U.S.C. §78aa, 15 U.S.C. §15, and 28 U.S.C. §1331.

claims accompany the federal claims (Counts III, IV and V.)

Defendant Credit Card Services Corporation ("CCSC") also runs a credit card loss notification service that is marketed by third-party endorsements. CCSC is located in Alexandria, Virginia. Defendant Ferry is the Chairman of the Board of CCSC. CCSC employs defendant Hurney as Vice-President of Sales. (These three defendants are referred to collectively as "the CCSC defendants").

Dow Jones is a publicly held corporation which publishes _Barron's National Business and Financial Weekly_ ("_Barron's_") and _The Wall Street Journal_. Defendant Abelson works for _Barron's_; he writes a column in it entitled "Up and Down Wall Street." Defendant Anreder also works for _Barron's_; he assisted Abelson in preparation of his column. (These three

defendants are referred to collectively as "the Dow Jones defendants".)

According to SafeCard, CCSC, Ferry, Hurney and others conspired to monopolize the "third-party-endorsed credit card loss notification market" as early as 1977. The conspirators had an agent steal a copy of the confidential proposal SafeCard had submitted to Standard Oil of California. They also decided to manipulate the market for SafeCard stock and to "stir up governmental investigatory agencies against

SafeCard."[4] (Second Amended Complaint, ¶27.)

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4. In March of 1977 the Federal Trade Commission notified SafeCard that the FTC was conducting an examination of SafeCard's practices in relation to 15 U.S.C. §45. The letter notifying SafeCard of the examination requested that it forward to the FTC descriptions of SafeCard's enrollment and billing procedures.

In late November 1978, SafeCard's counsel received another letter from the FTC. This letter stated:

"We are concerned that HotLine's [SafeCard's] advertising may inadequately explain the negative option aspect of HotLine's billing procedure, and fail to apprise customers that they will be required to act affirmatively to cancel HotLine services in order to prevent an automatic billing extending coverage beyond the 6 month free trial period. We believe that the inadequacies of HotLine's advertising may constitute a failure to disclose material facts necessary to portray fairly the negative option aspect of HotLine's billing arrangements and may, therefore, violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45."

The letter requested that SafeCard forward its advertising and solicitation materials to the FTC.

The investigation by the FTC was closed in June 1979.

On September 18, 1978, the Securities

The conspirators then "enlisted the aid" of the Dow Jones defendants. The

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and Exchange Commission sent SafeCard a letter with a subpoena duces tecum attached, requiring the production of certain documents. The letter notified SafeCard that the SEC had entered a "Formal Order of Investigation" of the company. An internal document of the SEC, recommending that the investigation be closed, dated June 27, 1980 states that

[t]his matter came to the attention of the Miami Branch Office as a result of information reported by a former vice-president of SafeCard . . . ., whereby he alleged that SafeCard was incapable of providing the services to its customers for which it was billing them; SafeCard prematurely recognized $1.9 million in revenue during the second quarter of 1978; and that SafeCard was not recording all its liabilities on its books.

Originally SafeCard believed that both the SEC and Barron's were dupes of the former SafeCard vice-president, Warren E. Drew, and did not consider the Dow Jones defendants participants in a conspiracy. On June 20, 1980, SafeCard's counsel wrote the SEC:

The sole source of this charge is the aforementioned Warren E. Drew. We have many times expressed our dismay that one such as Warren E. Drew could have established such credibility with cynical public and private institutions such as the SEC and Barron's. Perhaps, however, neither institution has been exposed before

Dow Jones publications were to provide "'independent' press verification of the malicious and disparaging charges which CCSC and its conspiratorial agents were making as part of their campaign to eliminate SafeCard as CCSC's only competitor in the relevant market." (Second Amended Complaint, ¶39)

THE DOW JONES DEFENDANTS

I. COUNT I: THE RULE 10b-5 CLAIM. Four articles critical of SafeCard appeared in Barron's between June 19, 1978, and July 6, 1981. The authors were

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to a hot stock artist putatively transformed instanter by an angel vision straight out of his television set from a wolf fat from the blood of widows and orphans to a lamb ready to sacrifice all for widows and orphans. Whatever, we all know that the Devil never turns loose one of his disciples gracefully and, alas, that pitchforked tail ogre was not to be denied his influence over Warren E. Drew . . . .

Abelson, Anreder and Dr. Abraham Briloff, the Emmanuel Saxe Distinguished Professor of Accountancy at Baruch College of the City University of New York. The articles disparaged SafeCard in various ways: they questioned the value of SafeCard's stock, impugned its accounting techniques, reported governmental investigations of SafeCard, and commented on its marketing techniques. SafeCard claims that the articles contain untrue statements of material fact,[5] or omit to state material facts, in order to create a false impression, and that these statements or omissions were made in connection with the

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5. Curiously, although SafeCard alleges falsehood and malice on the part of the Dow Jones defendants, it has not brought a pendent state libel claim.

grant and exercise of certain SafeCard options.

A. "In connection with . . . sale."

[1] It is clear that plaintiff considered itself the victim of widely circulated misinformation about it long before it chose to grant options. A letter from the chairman of SafeCard to Warren H. Phillips of Dow Jones, dated October 30, 1978, states: "[I]t appears Barron's knowingly and maliciously published false information designed to wreak havoc on the business of SafeCard as well as the public market for its securities." In another letter, reprinted in the March 26, 1979 issue of Barron's, SafeCard's counsel states: "If what you do this time is as irresponsible, malicious and untrue as it was last time, we shall hold you, Mr. Abelson, Barron's and Dow Jones responsible for all the consequences of the previous article and whatever you come up with this time."

The earliest time that a "sale"[6] could have occurred is on October 22, 1979,

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6. The definition of "sale" given in Section 3(a)(14) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(14), is very broad: "any contract to sell or otherwise dispose of." The exercise of a stock option is a sale for purposes of the Act. Maldonado v. Flynn, 448 F.Supp. 1032 (S.D.N.Y. 1978). However, the court does not agree with SafeCard's Form 10-K for the fiscal year ended October 31, 1981, filed January 29, 1982, which reads: "No options were exercised during the fiscal year ended October 31, 1981. However, during fiscal 1980, officers and directors holding stock options to purchase 313,200 shares, personally and unconditionally obligated themselves to pay the exercise price of the options within the five-year term of the options, thereby exercising said options." The court believes that a correct statement as to exercise was included in SafeCard's Form 10-K submitted for the previous fiscal year: "At October 31, 1980, none of the above listed options had been exercised, with options for 7,000 shares still available for grant under the 1979 non-qualified stock option plan." Nonetheless, because the grant of options is a sale within the meaning of Section 3(a)(14), Collins v. Rukin, 342 F.Supp. 1282 (D.Mass.1972); Wright v. Heizer Corp., 560 F.2d 236 (7th Cir. 1977), cert. denied, 434 U.S. 1066, 98 S.Ct. 1243, 55 L.Ed.2d 767 (1978), the court assumes for purposes of this motion

when SafeCard's management decided to establish a stock option plan. The SafeCard board ratified this plan on December 11, 1979. The first agreements to exercise the options were signed by SafeCard officers beginning in March of 1980.

In the ordinary situation a false or misleading statement of material fact causes a sale when the seller relies on it. For instance, a false or misleading statement made in a newspaper column, relied on by stockholder readers, may cause them to

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that the grant of options by SafeCard constituted sales within the meaning of Section 3(a)(14).

SafeCard also claims a "sale" within the meaning of Section 3(a)(14) when it signed an underwriting contract for issuance of 1,000,000 shares of stock with Drexel, Burnham, Lambert, Inc. on May 20, 1981. Whether or not this counts as a sale for purposes of §10(b), SafeCard was aware at that time also of the publication of what it regarded as false or misleading statements about it.

sell to their detriment. By contrast, if the seller knows the statement to be false, he has not relied on its purported veracity, and the statement has not induced his sale. SafeCard clearly did not rely on the Dow Jones defendants' statements about it. Also, SafeCard does not claim that the statements caused it to sell.

Whether proof of some causal nexus between fraud and sale ("transaction causation") is an essential element of proof is a matter of dispute. Some courts have not required proof of transaction causation. After all, the policy of Rule 10b-5 is to deter frauds and to provide redress for the losses caused by frauds. ("Loss causation" definitely is a necessary element of proof.) Other courts have required proof of transaction causation. Compare Ketchum v. Green, 557 F.2d 1022, 1029 (3d Cir. 1977), cert. denied, 434 U.S. 940, 98 S.Ct. 431, 54 L.Ed.2d 300 (1977),

with Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 380-81 (2d Cir. 1974), cert. denied, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467 (1975).

In Gurley v. Documation, Inc., 674 F.2d 253 (4th Cir. 1982), the Fourth Circuit denied standing to a plaintiff who claimed he was fraudulently caused to delay the sale of his securities, because of the potential for abuse of §10(b) by plaintiffs with unmeritorious claims. Because a delay-in-sale claim would turn on conflicting testimony as to whether fraud was the cause of the delay in sale, a plaintiff with an unmeritorious delay-in-sale claim would be able to resist disposition of his suit by pretrial motion, and could exert pressure on a defendant to settle even a frivolous case. See Gurley at 256-258.

Gurley bears on the instant case in two ways. First, it implies that

transaction causation is a relevant consideration in a misrepresentation case. Compare Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972) (obligation to disclose plus withholding of material fact establishes requisite causation and reliance in case involving primarily failure to disclose). Second, it rejects a certain type of transaction causation as insufficient to confer standing under §10(b), because the speculative nature of proof of that kind of causation would open up a Pandora's box of unmeritorious claims.

A finding of "in connection with" where a person sells after knowledge of a fraud would put him in an anomalous risk-free situation: if his securities performed less well than he hoped, he could sue under §10(b) to raise his yield; or if his securities performed up to

expectations despite the fraud, he would refrain from suit. By contrast, a seller in a non-fraud situation always takes a risk that the performance of his securities will fall below expectations.

It is not the purpose of Rule 10b-5 to establish an insurance scheme for corporate issues and investors. See List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir. 1965), cert denied, 382 U.S. 811, 86 S.Ct. 23, 15 L.Ed.2d 60 (1965). "The securities laws were not enacted to protect sophisticated businessmen from their own errors of judgment." Hirsch v. DuPont, 553 F.2d 750, 763 (2d Cir. 1977). The court holds that a corporate securities issuer who voluntarily[7] sells after

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7. Involuntary sales are a different matter. See Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir. 1967), cert. denied, 389 U.S. 970, 88 S.Ct. 463, 19 L.Ed.2d 460 (1967) (forced sales of stockholders by

knowledge of a fraud does not rely on and is not caused to sell by the fraud, and cannot recover under Rule 10b-5. In re Penn Central Securities Litigation, 62 F.R.D. 181, 186 (E.D.Pa.1974).

B. "Untrue statement of material fact."

[2] A true statement does not fall within the ambit of Rule 10b-5. A number of statements to which SafeCard objects are indisputably true.[8]

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short-form merger squeeze-out makes reliance irrelevant).

8. In the June 19, 1978 issue of Barron's, Abelson stated:

One thing that's bothered us from the start was the 'negative option' aspect to the company's Hot Line service -- that is, if the credit cardholder, during his free trial period, doesn't actively do something to cancel, he's automatically enrolled and just as automatically billed. That sort of thing is strictly no-go now if a product is involved. We're not at all clear why a service is different. But legally, it is different. We might add that it seems

A number of statements appearing in the articles, particularly those authored by Dr. Briloff, are expressions of opinion. Although Rule 10b-5 speaks in terms of statements and omissions of facts, some opinions have been considered statements of "fact" for purposes of Rule 10b-5. See e.g., Dolgow v. Anderson, 53 F.R.D. 664 (E.D.N.Y. 1971), affirmed per curiam, 464 F.2d 437 (2d Cir. 1972). In such cases the defendant usually is a broker-dealer,

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common practice in the field; at least, so far as we know, at least one major SafeCard competitor uses the identical approach.

Dow Jones acknowledged that the statement that negative option is "no-go" for products is incorrect. However, that is not an untrue statement of material fact, since SafeCard offers a service.

A fact is not material if there is not a substantial likelihood that a reasonable investor would consider the fact important in making her investment decision. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 426 n.9, 96 S.Ct. 2126, 2131 n.9, 48 L.Ed.2d 757 (1976).

who by virtue of his position and relationship to clients has a duty to disclose what he knows and to undertake a reasonable investigation. See e.g., Hanly v. Securities and Exchange Commission, 415 F.2d 589 (2d Cir. 1969). This duty is not obviously transferable to writers for a newspaper.

[3] The court holds that Rule 10b-5 cannot reach the Dow Jones defendants' statements expressing opinion, because the statements appeared in the press, the context or specific assertions make clear that the statements are expressions of opinion,[9] the opinions are not clearly

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9. SafeCard singles out Dr. Briloff's statement in the July 6, 1981, issue of Barron's, "I maintain that the company, in fact, is engaged in accounting no-no's" as an example of a statement put forward as an assertion of fact. Whether "in fact" implies "it is a matter of fact that . . .", or was used merely for emphasis, is a question over which reasonable minds

unreasonable (in which case they would be immaterial anyway), there is no evidence

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might differ. More telling that the statement is an expression of opinion is the sentence's beginning with "I maintain that . . . ." Most important, the context in which the statement appears indicates that the author is expressing his own opinion, with which (the author duly notes) others disagree. In pertinent part, the article reads:

As a general rule, cost deferrals are comprehensible to the extent that they seek to match costs with revenues. But--and in SafeCard's case, this is a very big but--as the company's footnote suggests, SafeCard is matching most costs not only against revenues but also against extended expectations. And this is where the concern and its auditors, as I see it, part company with proper accounting.

As the financial statements indicate, SafeCard charges off its marketing costs over a 3-to-10 year period (as noted, the company recently shifted to a principally 10-year write-off, but more about that later). In fiscal 1980, the expense for its service programs amounted to \$7.8 million (\$1.5 million, \$1.7 million, \$1.9 million and \$2.7 million for the four consecutive fiscal quarters). In the first two quarters of the current fiscal year, the amounts charged were \$2.9 million and \$3.4 million, respectively.

This amortization process presumably is entirely in accord with generally accepted accounting principles, since the

that the opiner does not believe the opinion he expressed, there is no evidence

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fiscal year reports received the nihil obstat (a clean opinion) from Alexander Grant & Co., SafeCard's independent auditor. The interim quarterly data for the current year, albeit unaudited, are included in a June 1981 preliminary prospectus (issued in connection with a proposed one-million share common stock offering, the proceeds to go roughly half to the company and half to certain selling stockholders). Further, SafeCard's management has advised me that its accounting practices have been reviewed by the Securities & Exchange Commission's Miami office and found appropriate.

All this authentication notwithstanding, I respectfully disagree. I maintain that the company, in fact, is engaged in accounting no-nos. When queried by me, the company's management and its auditors responded by asserting that they were following the "matching process," i.e., the matching of costs against related revenues. As I suggested, this is fine, up to a point. But SafeCard, I submit, is carrying this concept to an extreme.

Thus, it is matching increased costs not only against revenues presumed to have been derived from those outlays, but also, as noted, those expected to be derived in the future. Trouble is, the latter is expected to be derived over as much as a decade through renewals, which may or may not materialize and which make

that the opiner or the publisher have had any economic interest in the corporation written about or in competitor corporations, and the opiners are not insiders to the corporation written about.

II. COUNT II: THE ANTITRUST COUNT. The Dow Jones defendants are capable of committing antitrust violations against SafeCard only via conspiracy. Since Dow Jones does not compete with SafeCard, the Sherman Act's §2 prohibition on attempts to monopolize cannot apply to Dow Jones.

A. Sherman Act §2: Specific Intent.

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little, if any, allowance for heightened competition or changing technology. And here is where I contend that SafeCard's management and auditors have departed from a fair application of generally accepted accounting principles, with a consequent distortion of the company's financial statements. [Emphasis added]

To establish the existence of a combination or conspiracy to monopolize in violation of Section 2, a plaintiff must prove the following elements: (1) the existence of a combination or conspiracy; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon a substantial amount of interstate commerce; and (4) the existence of specific intent to monopolize. Cullum Electric & Mechanical, Inc. v. Mechanical Contractors Association of South Carolina, 436 F.Supp. 418, 425 (D.S.C.1976), affirmed, 569 F.2d 821 (4th Cir.), cert, denied, 439 U.S. 910, 99 S.Ct. 277, 58 L.Ed.2d 255 (1978).

SafeCard's proposed evidence to prove specific intent on the part of the Dow Jones defendants includes: (1) Abelson evinced personal animosity towards SafeCard chairman Peter Halmos; (2) the Dow Jones defendants contacted SafeCard's competitor CCSC and federal agencies

concerning SafeCard on various occasions; (3) an advance copy or draft of a Barron's article may have reached one of the other defendants; (4) statements critical of SafeCard made by different defendants were similar in content; (5) statements published by the Dow Jones defendants were false or misleading; and (6) CCSC used the publications against SafeCard in competing for accounts.

CCSC's using the publications to scare accounts away from SafeCard merely illustrates the propensity of competitors to repeat unflattering statements about the opposition. Abelson's animosity is consistent both with monopolistic and nonmonopolistic intent. The Dow Jones defendants' contacts with CCSC and federal agencies are consistent with ordinary news gathering. Dow Jones published no falsehoods about SafeCard. The publication of truth and reasoned opinion (which may or may

not agree with the opinions of news sources) is consistent with ordinary news reporting and commentary. Were newspapers to become hostage to antitrust suits surviving pretrial disposition on the basis of news source contacts and critical commentary, the threat of such suits would operate as a deterrent to the effective functioning of the press.

Even though proof that defendants have engaged in practices that make no economic sense unless monopoly results is not an essential element of a Sherman Act §2 claim, such proof is often offered as probative of the existence of conspiracy under both §§1 and 2. _See_ _Admiral Theatre Corp. v. Douglas Theatre Co._, 585 F.2d 877, 884 (8th Cir. 1978); _H & B Equipment Co., Inc. v. International Harvester Co._, 577 F.2d 239, 245 (5th Cir. 1978); _Overseas Motors, Inc. v. Import Motors, Ltd._, 375 F.Supp. 499, 535

(S.D.Mich. 1974), affirmed, 519 F.2d 119 (6th Cir. 1975), cert. denied, 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 304 (1975).

[4] Specific intent to monopolize also may be inferred from extreme predatory or exclusionary conduct. Human Resource Institute v. Blue Cross, 498 F.Supp. 63 (E.D.Va.1980); United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (E.D.Pa.1960), affirmed, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974).

[5] Of course, it would be impossible for a noncompetitor such as Dow Jones to engage in "predatory conduct" towards SafeCard, but it is entirely possible for a newspaper writer to derive economic benefit from his writing by, for instance, touting a corporation in which he owns stock. See Zweig v. The Hearst

Corporation, 594 F.2d 1261 (9th Cir. 1979). The lack of any evidence of economic benefit inuring to the Dow Jones defendants as a result of their alleged acts militates strongly against the reasonableness of inferring the requisite specific intent in this case. See First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 287, 88 S.Ct. 1575, 1591, 20 L.Ed.2d 569 (1968) (lack of benefit to defendant militates against finding of conspiracy).

The standards governing summary judgment in antitrust actions are well-known. Plaintiffs can be relied upon to quote Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962): "[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the

alleged conspirators, and hostile witnesses thicken the plot." Defendants exhibit a marked preference for White Motor Co. v. United States, 372 U.S. 253, 259, 83 S.Ct. 696, 700, 9 L.Ed.2d 738 (1963): "Summary judgments have their place in the antitrust field, as elsewhere . . . ."

The fewer the individual strands of circumstantial evidence, and the less distinguishable assertedly probative conduct is from the conduct of persons going about their business in an ordinary way, the less reasonable an inference of specific intent to monopolize becomes. There is a vanishing point beyond which inferences of intent on the basis of "disparate strands of highly equivocal circumstantial evidence" become unreasonable. J.W. Burress, Inc., v. JLG Industries, Inc., 676 F.2d 693 (4th Cir. 1982) (unpublished) (inferences of conspiracy and price discrimination). The evidence which plaintiff intends to present

at trial is too attenuated for a rational jury to infer the specific intent required under §2 of the Sherman Act.

B. Sherman Act §§1 and 2: Conspiracy

For the same reasons that plaintiff's evidence is deficient on proof of the necessary element of specific intent under §2, the court finds that the evidence is likewise deficient for proof of conspiracy under §§1 and 2.

C. Sherman Act §1: "Restraint of Trade."

[6] Section 1 of the Sherman Act forbids "conspira[cies] in restraint of trade." Soon after enactment of the Sherman Act, the Supreme Court interpreted Section 1 to ban only "undue limitation on competitive conditions," that is, restraints which are "unreasonably restrictive." Standard Oil of N.J. v.

United States, 221 U.S. 1, 58-60, 31 S.Ct. 502, 515-516, 55 L.Ed. 619 (1911). Some restraints are so obviously incompatible with competitive behavior that they constitute per se violations of Section 1. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-3, 60 S.Ct. 811, 843-844, 84 L.Ed. 1129 (1940) (horizontal price-fixing); United States v. Topco Associates, Inc., 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) (territorial market allocation). Other putative restraints are subject to a "rule of reason" analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918).

The activity engaged in by the Dow Jones defendants was the publication of truth and opinion of the sort described above. Even assuming a combination of the press and a competitor of plaintiff such as plaintiff alleged, this cannot be the kind of activity which Section 1 of the Sherman Act was designed to prevent. This sort of behavior is far removed from a paradigmatic trade restraint such as price-fixing undertaken by a group of competitors against a fellow competitor. Moreover, it is an article of national faith that on balance the free flow of truth and reasoned opinion <u>enhances</u> competition. Hence the Dow Jones defendants have not engaged in any unreasonable restraint of trade.

[7] III. THE PENDENT STATE CLAIMS. The court declines to exercise jurisdiction over the pendent state claims

as to the Dow Jones defendants for two reasons. First, the application of Va.Code §18.2-500[10] to press defendants could raise

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10. In pertinent part, §18.2-500(a) reads:

> Any person who shall be injured in his reputation, trade, business or profession by reason of a violation of §18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel; and without limiting the generality of the term, "damages" shall include loss of profits.

In pertinent part, §18.2-499 provides:

> (a) Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of wilfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be jointly and severally guilty of a Class 3 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under §18.2-500.
>
> (b) Any person who attempts to procure the participation, cooperation, agreement or other assistance of any one or more persons to enter into any combination, association, agreement, mutual understanding or concert prohibited in

substantial constitutional questions from which the court believes it should abstain.[11] Cf. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-726, 11 L.Ed.2d 686 (1964) (public-official plaintiff must prove actual malice in defamation action). The lack of guidance from the state courts on interpretation of the statutory terms -- for instance, whether the term "maliciously" refers to "legal malice" or "actual malice" -- exacerbates the difficulties of application. Second, now that the federal

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subsection (a) of this section shall be guilty of a violation of this section and subject to the same penalties set out in subsection (a) hereof.

11. Because the court grants summary judgment to the Dow Jones defendants on the federal counts on nonconstitutional grounds and declines jurisdiction over the state counts, it takes no position on the merits of the constitutional arguments they have raised.

counts are no longer in the case against Dow Jones, the court has doubts regarding the propriety of applying Virginia law as between parties whose principal places of business are Florida (SafeCard) and New York (Dow Jones). Hence the court will dismiss the state counts without prejudice by the accompanying order.

THE CCSC DEFENDANTS

[8] For the reasons stated above, and because the CCSC defendants did not make the statements upon which SafeCard's §10(b) claim is premised, the court grants summary judgment to the CCSC defendants on Count I.

[9] The Sherman Act §1 and §2 claims and the pendent claims survive the motion for summary judgment as to the CCSC defendants, because issues of material fact remain. The §1 count remains in the case insofar as plaintiff is able to

prove that Ferry and/or Hurney conspired with CCSC.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1487

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| SafeCard Services, Inc., | Appellant, |
| v. | |
| Dow Jones and Company, Inc. Credit Card Services Corp., Alan Abelson, Steven Anreder, John P. Ferry and Walter Hurney, | Appellees. |

No. 82-1528

| | |
|---|---|
| SafeCard Services, Inc., | Appellee, |
| v. | |
| Dow Jones and Company, Inc., Alan Abelson and Steven Anreder, | Defendants, |
| and | |
| Credit Card Services Corp., John P. Ferry and Walter Hurney, | Appellants. |

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge.

Argued: March 9, 1983

Decided: March 31, 1983

Before RUSSELL and HALL, Circuit Judges; and HAYNSWORTH, Senior Circuit Judge.

Hugo Black, Jr. (Kelly, Black, Black & Earle, P.A. on brief) for Appellant; Michael B. Mukasey (Ann Loeb, Patterson, Belknap, Webb & Tyler on brief) for Appellees Dow Jones & Company, Inc., Alan Abelson and Steven Anreder; David G. Fiske (John E. Coffey, Susan L. Rogers, Thomas & Fiske, P.C. on brief) for Appellees Credit Card Services Corporation.

PER CURIAM:

SafeCard Services, Inc. appeals from a district court order granting summary judgment in favor of the defendants Dow Jones & company, Inc., Alan Abelson and

Steven Anreder, and partial summary judgment in favor of Credit Card Service Corporation, John P. Ferry and Walter Hurney.* After reviewing the record and hearing the oral arguments of counsel, we conclude that for reasons sufficiently appearing in the district court opinion we affirm.

<u>A F F I R M E D</u>

* The parties stipulated to a voluntary dismissal without prejudice of the remaining claims under Fed.R.Civ.P. 41(a)(1)(ii).